93-199

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN RE JESUS M. RIVERA-ARVELO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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52 pp

QUESTIONS PRESENTED

1. Is it a denial of due process under the U.S. Constitution for the Supreme Court of Puerto Rico to indefinitely suspend an attorney on grounds which would not have existed if a trial court had properly applied the rule of res judicata?

2. Is it a denial of due process under the U.S. Constitution for the Supreme Court of Puerto Rico to base a finding of violations of the Code of Professional Ethics upon factual allegations ruled upon by summary judgment in a collateral proceeding?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Jesus M. Rivera-Arvelo, and the respondents, Attorney General of the Comonwealth of Puerto Rico.

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I. If the trial court had properly applied the rule of res juudicata, no grounds would have existed for the indefinite suspension of Petitioner.

II. The Supreme Court of Puerto Rico improperly allowed its inquiry into the Petitioner's conduct to be based upon factual matters alleged in a collateral case which was wrongly decided by summary judgment, thereby denying petitioner his fourteenth amendment right to due process of law.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN RE ATTORNEY

JESUS M. RIVERA-ARVELO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

The petitioner, Jesus M. Rivera-Arvelo, respectfully prays that a writ of certiorari issue to review the judgment and order of the Supreme Court of Puerto Rico denying petitioner's Motion for Reconsideration on May 7, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Puerto Rico is reprinted in the appendix hereto, p. 25, infra.

JURISDICTION

The jurisdiction of this matter arises under the general power of the Supreme Court of Puerto Rico to discipline attorneys admitted to practice in that court.

The jurisdiction of this Court to review the judgment of the Supreme Court of Puerto Rico is invoked under 28 U.S.C. §§ 1257 and 1258.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides that:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section one of the Fourteenth Amendment to the U.S. Constitution provides that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner is an attorney practicing in the

Commonwealth of Puerto Rico. On December 15, 1975, Pedro L. Santoni and Benigna Colon de Santoni, husband and wife, executed a mortgage note (hereinafter "the note"). The note was in the amount of $40,000, was due upon presentation, and listed an annual interest rate of 8 1/2 percent. The note was authenticated before Notary Public Manuel Medina Aymat.

In 1976, Pablo Grillo Ramirez became the owner and holder of the note. Later that same year, Pablo Grillo Ramirez died, and on April 20, 1977, his sons filed a civil action for mortgage foreclosure against the Santonis. Mr. Ramirez's wife, Consuelo Leon Torres, was not included as a party in the mortgage foreclosure action. On July 21, 1982, the Superior Court, Caguas Part, dismissed, with prejudice, the mortgage foreclosure action under Court Rule 11 due to inactivity. The petitioner acted as the Santoni's attorney in the mortgage foreclosure action.

On October 5, 1982, -- approximately 2 1/2 months after the mortgage foreclosure action was dismissed, with prejudice, for inactivity -- the Santonis transfered their interest in the property which was the security for the note to the petitioner and petitioner's wife. The transfer was made in payment of legal services petitioner had provided to Mr. Santoni. At the time the property was transferred to petitioner, the Santonis were about to leave Puerto Rico to reside in the United States. On that same date, the Santonis mistakenly cancelled a note similar to the one executed before Notary Public Manuel Medina Aymat on December 15, 1975. The cancelled note was a file copy of a note in the files of Mr. Santoni which was identical in all respects to

the actual note and was initially executed, but was simply placed in the file and not recorded, because it contained a usurious interest rate.

Approximately four years later, in 1986, the sons of Mr. Ramirez filed another mortgage foreclosure action, in a different territorial court, alleging the same facts, with a few additional allegations. The petitioner was a defendant in the 1986 action. Both Petitioner and the plaintiffs in the mortgage foreclosure action filed motions for summary judgment. The plaintiffs presented evidence to the court in support of their motion for summary judgment by way of affidavit, which merely asserted the truth of their allegations and also presented a photocopy of the cancelled deed transfering the Santoni property to petitioner.

The court granted the plaintiff's motion for summary judgment, finding that the judgment dismissing the initial mortgage foreclosure action on July 21, 1982, was null and void. The court also ordered that the cancellation of the note was null and void, and ordered foreclosure of the note in favor of the Ramirez estate. In addition, the court found that the signature of Notary Manuel Medina Aymat on the cancelled promissory note had been falsified. Finally, the court ordered the property sold and the proceeds paid over to the Ramirez estate. The basis of the court's decision was the fact that Mr. Ramirez's wife was not a party in the original mortgage foreclosure action.

The petitioner requested review of the trial court's decision granting the plaintiff's motion for summary judgment, but the Supreme Court of Puerto Rico, in a resolution dated June 16, 1988, decided not to accept the

appeal. The case was then referred to the Attorney General of Puerto Rico to review the conduct of petitioner and Notary Carlos M. Ortiz Velazquez concerning the Santoni/Ramirez mortgage foreclosure cases.

On October 27, 1988, the Attorney General of Puerto Rico filed a complaint accusing petitioner of violating Section 3773 of 31 LPRA, section 742, by transferring property that was the subject of litigation. This transfer was alleged to have violated Rules 23 and 25 of the Rules on Professional Ethics. The complaint also accused the petitioner of violating Professional Ethics Rules 17, 26, and 35, because he knew that the original promissory note was in the hands of the Ramirez estate and thereby offered a false account of the facts and law in the 1986 mortgage foreclosure action.

The petitioner responded to the complaint. He denied that he obtained an interest in property that was the subject of litigation because at the time he obtained the property, the judgment dismissing the mortgage foreclosure case with prejudice had been issued. He also denied that he knew about the falsity of the cancelled promissory note. Finally, the petitioner denied that he offered a false account of the facts and law in the 1986 mortgage foreclosure proceeding because he did not know of the falsity, if any, of the cancelled promissory note.

The Supreme Court of Puerto Rico appointed a Special Commissioner to preside over an evidentiary hearing and to render a report with fact determinations. The Special Commissioner's report was forwarded to the Supreme Court of Puerto Rico, which reviewed the report and took judicial

notice of the two mortgage foreclosure proceedings. The Court then found that the allegations in the Complaint were true and ordered petitioner indefinitely suspended from the practice of law and notary. The petitioner now seeks review of that decision by the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

The trial court improperly applied the rule of res judicata and, in doing so, caused petitioner to be denied his property interest in his profession without due process of law.

The petitioner has a property interest in the practice of his profession. See, for example, Flochower v. Board of Educ. of New York, 350 U.S. 555 (1955). The Fourteenth Amendment to the U.S. Constitution provides, in part, that no state shall deprive any person of life, liberty, or property without due process of law. It has been said that "due process" requires "some kind of hearing." Wolff v. McDonnell, 418 U.S. 539 (1974).

The hearing petitioner received before the Special Commissioner denied petitioner his Fourteenth Amendment right to due process because it was based upon a decision rendered in a case which should have been dismissed on res judicata grounds. That is, the second mortgage foreclosure action, which became the basis for the disciplinary action against petitioner, should never have been allowed to proceed to judgment because it was barred by the rule of res judicata due to the dismissal of the original mortgage foreclosure action with prejudice for failure to prosecute. The petitioner raised the issue of res judicata before the trial court, but the Supreme Court of Puerto Rico failed to address the issue when it entered its judgment indefinitely suspending the

petitioner. (See the copy of the judgment in the Appendix at pg. 40)

A well-established part of the doctrine of "res judicata" is that a prior judgment has preclusive effects in a subsequent judicial proceeding if the parties to the subsequent proceeding were "in privity" with the parties to the first proceeding. This concept of "privity" was ignored by the trial judge when he ruled upon the plaintiff's motion for summary judgment in the second mortgage foreclosure action. The doctrine of res judicata does not hinge upon how the prior case was decided, but, rather, upon whether the rights in controversy in the first action were finally decided. Araujo v. Arenas, 62 DPR 284.

In Gonzalez v. Mendez, 15 DPR 701, which was an action alleging the nullity of an alienation made by the mother of an underage minor upon the minor's property, the notion of "privity" in the context of res judicata was analyzed as follows:

> When an action asks for the nullity of an alienation made by the mother of a minor child's property for lack of judicial authorization to do so and in another action the same nullity is requested by a different foundation stating that the mother lacked of patriae potestas over her daughter, being the object of both lawsuits to claim an inheritance and annul the deed of alienation, there is an identity of action that gives birth to the defense of res judicata.

Id.,

Maintenance of public peace and the need for finality of judgments are two of the reasons which support the doctrine of res judicata. Article 1219 of the Puerto Rican Civil Code provides that:

> For the presumption of res judicata having bearing on another trial, it is necessary that between the case already solved by a judgment and that which is being filed the most perfect identity of privity concurs between the things, causes, parties and the quality with which they were in it.
>
> It is understood that there is an identity of persons when the parties of the second lawsuit are successors of those in the first lawsuit, or that are tied to them by privity or by what establishes the ties between those that have the right to claim them or the obligation to satisfy them.

Id.

Spain's Supreme Court, in interpreting Article 1252 of the Civil Code, which is the same as 1219 of the present code, expressed the following regarding res judicata and the privity requirement:

There is the presumption of res judicata when among the parties of the previous lawsuit and the present one there is judicial solidarity that produces when exercising it on both actions with the same objective, invoke the same foundations and support the allegations that make identical the conditions of the parties and the result which is asked for in relation to the title which is prayed for, even when it is intended as in the present case, to establish some different shade in the personality of the defendant-appellant party, because if it wasn't so, which more than different actions are new reasonings that come up to the parties to oppose a judgment once it has been awarded, would come, as an infraction to the laws and fundamental doctrines established on the efficiency and unalterability of res judicata, to contradict what has been decision in the judgment and definitely resolved.

Besides, there is no breaking of said identity by the circumstance that in the second lawsuit one of the defendants-appellants was not part of the first one. Judgment by the Supreme Court of Spain, May 5, 1909. So in this way there is an almost perfect identity of persons in both lawsuits and identical is also the quality in which they were plaintiffs-appealed and the defendants.

> It is true that new parties are now brought as defendants. . ., but are tied by privity. . . .
>
> This new and posterior incident cannot destroy the legal identity which explains article 1219 of the Civil Code in force that we have quoted and inserted previously.

Judgment of the Supreme Court of Spain, May 5, 1909.

It has been said that the doctrine of res judicata is "a rule of justice fundamental and essential to the public interest and private peace that should be observed and put in force by the courts so that the rights, once established by a final judgment issued by the court of jurisdiction, be recognized by those who are in every way obliged by them, in any place that the judgment must be respected." Hart Steel. v. Railroad Supply, 244 U.S. 294 (1916); AAA v. Melendez, 98 DPR 516 (1970); Cintron v. Yabucoa Sugar, 54 DPR 518 (1939).

As far as the "privity" question is concerned, it is well-established that, for purposes of res judicata, "privity" exists and bars a subsequent action if there is an identity of persons such that the litigators of a second lawsuit are the successors of those of the first lawsuit or are tied to them by ties of solidarity. Rodriguez v. Castaign, 7 DPR 370 (1904). That is, if the widow was not made a party to the first mortgage foreclosure proceeding, her absence does not diminish the res judicata effect of the judgment issued as part of the proceedings because she was in privity with the parties to the

action.

Furthermore, the "ties of solidarity" necessary for the parties to the first action to be considered the same as the parties to the second action need only be such that "the litigant in the second lawsuit exercises the same cause of action and invokes equal foundations and supports himself on the same titles as the first one." See A & P Gen. Contractors v. Assoc. Acmme, 100 DPR 753 (1981); Succession of Zaya v. Berrios, 10 DPR 551 (1964).

Generally, a judgment dismissing a case, with prejudice, for failure to prosecute or inaction, has the effect of res judicata. Succession of Rosario v. Succession of Cortijo, 83 DPR 628 (1961).

Brown v. Felson 422 US 127, 99 S. Ct. 2205, 60 L. ed. 767 (1979), is a case which sets forth legal principles applicable to petitioner's case. It is a well-established rule of res judicata that a judgment is compulsory in favor or against all the parties to final judicial proceedings, including those persons who have ties of solidarity, or, in other words, are in "privity." Commissioner v. Sunnen, 333 US 591, 92 L Ed 898 68 S Ct 715; Hastings v. Rose Courts Inc., 237 Ark. 426, 373 S.W.2d 583 (1963), cert den 377 US 964, 12 L Ed2d 735, Draper v. Medlock, 122 Ga. 234, 50 S.E. 113; Hedlund v. Miner, Ill 217, 69 N.E.2d, Denney v. State, 144 Ind. 503, 42 N.E. 929; Butler v. Butler, 253 Iowa 1084, 114 N.W.2d 595 (1962). The "privity" doctrine applies whether the party raising the res judicata bar was the plaintiff or the defendant in the prior action. Petrus v. Robbins, 196 Va. 322 83 S.E.2d 408; Sutphen Estates, Inc. v. United States, 342 U.S. 19, 96 L. Ed. 19.

Even when the doctrine of collateral estoppel emphasizes the identity of the parties, the relationship between the parties in the previous lawsuit still constitutes a significant part of the analysis; the doctrine, certainly, limits not only the parties of the first lawsuit, but also those that have privity ties. Weiner v. Greyhound Bus Line Inc., 55 A.D. 2d 189 N.Y.S.2d 884.

What constitutes "privity?" It has been held that the concept of privity has to do with a person identified and with interest in another who is represented of the same legal rights, and the word privity has been considered as to include those persons whose interests were represented by one party in a lawsuit. Montgomery v. Whitehead, 40 Colo. 320, 90 P. 509. Privity also exists when a party acts in a representative capacity and as such is authorized to litigate a matters in controversy for those whom he represents. Green v Broghy, 71 App. O.C. 299, 110 F.2d 539, 9 A.L.R.2d 1; King v International Union of Operating Engineers, 114 Cal. App. 2d 159, 250 P. 2d 11;

Murdok v. Eddy, 38 Cal.App. 2d 551, 101 P.2d 722.

In petitioner's case, the widow Consuelo de Leon allegedly was not informed about the first mortgage foreclosure action. However, she was in privity with the parties to that lawsuit. She was fully represented by the actions taken by those involved.

The parties to the second mortgage foreclosure action were simply trying to avoid the consequences of the judgment rendered on July 21, 1982, by the Superior Court, Caguas Part. That judgment was final, and any subsequent attack upon it was improper and should have been dismissed.

An independent action can not be used to avoid the consequences of a binding final judgment. Figueroa v. Banco de San Juan, 108 DPR 680 (1979); Rodriguez v. Tribunal Superior, 102 DPR 290 (1974). The plaintiffs in the first mortgage foreclosure action, which was dismissed with prejudice for failure to prosecute, had an opportunity to appeal the lower court's decision to the Supreme Court of Puerto Rico. Having failed to do so, they should not have been allowed to later use a subsequent lawsuit as a means of avoiding the effects of a valid final judgment. O. Pares, Inc. vs. Galan, 98 DPR 772 (1970).

If the parties to the second mortgage foreclosure action wanted to clarify the judgment entered in the first mortgage foreclosure action, they could easily have done so by using the procedures available for such a clarification. Pineiro v. Martinez Santiago, 104 DPR 587 (1976).

In short, the trial court's decision to allow the plaintiffs to bring a second mortgage foreclosure action in the presence of a valid, final, and binding judgment involving the same parties and the same issues, denied petitioner due process of law as guaranteed by the Fourteenth Amendment to the U.S. Constitution. The due process denial arose from the fact that petitioner's property interest in his employment as an attorney, as described below, was taken from him because of the trial court's refusal to follow long-established and clearly-applicable judicial principles. If the trial court had properly dismissed the second mortgage foreclosure action, the issues upon which the Supreme Court of Puerto Rico based its indefinite suspension of petitioner would never have arisen.

II.

The Supreme Court of Puerto Rico improperly allowed its inquiry into the Petitioner's conduct to be based upon factual matters alleged in a collateral case which was wrongly decided by summary judgment, thereby denying petitioner his Fourteenth Amendment right to due process of law.

The petitioner's hearing before the Special Commissioner was meaningless because of the reliance by the Special Commissioner upon the flawed findings of the trial court in the second mortgage foreclosure action. As the Court may recall, that action was decided upon the plaintiff's motion for summary judgment, which was ruled upon without an evidentiary hearing. The plaintiff merely submitted affidavits which were accepted by the trial court as a true and correct statement of the status of the case. This occurred even though in Puerto Rico, just as in every State, a case cannot be decided by summary judgment if there is a genuine issue of material fact.

The key to the case before the Court is that factual issues which were vital to the Petitioner's disciplinary case, but not vital to the mortgage foreclosure action, were decided by summary judgment in the mortgage foreclosure action. Those factual determinations were then, at a later date, relied upon as "gospel" by the Special Commissioner. Consequently, the Petitioner was not given a meaningful

hearing before the Special Commissioner and was denied due process of law. In Mathews v. Eldridge, 424 U.S. 319 (1976), the U.S. Supreme Court held that ". . . the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" The Petitioner's case was never meaningfully heard -- not at the time of the ruling upon the second mortgage foreclosure action, nor at the time of his disciplinary hearing before the Special Commissioner.

Petitioner was also denied due process because the fact finder in his case -- the Special Commissioner -- was ultimately the decision maker. Admittedly, the Supreme Court of Puerto Rico reviewed the Special Commissioner's decision, but the review was cursory and gave great deference to the Special Commissioner's findings. This procedure is woefully lacking in Constitutional due process protection, and Petitioner has been denied his due process rights as a result. See Goldberg v. Kelly, 397 U.S. 254 (1970).

Assuming, for the sake of argument, that res judicata did not apply, the facts in the second mortgage foreclosure action were in dispute. There were numerous genuine issues of material fact which should have prevented the trial court from deciding the case as a matter of law. One of the allegations in the second mortgage foreclosure action was that **forgery** took place. Forgery is not proven by merely setting forth an allegation of forgery. The elements of forgery must be proven, and those elements do not lend themselves to determination by summary judgment. Factual issues existed. The malice, intention, knowledge, and any other

attitude or mental state of a person can be asserted in general terms, but not when coupled with an allegation of fraud or error. It has been said that:

> "Fraud is not presumed, and even when the evidence of the same cannot be as strong or as direct as ordinarily is required to prove other extremes, it should be sufficiently solid, clear and convincing so that the judge feels no hesitation upon making statements on a fact that is within the boundaries of a criminal act."

Banco Credito v. Chico Sagastibelza. 90 DPR 125 (1964).

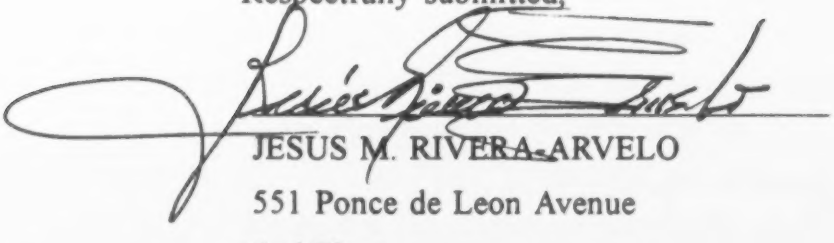
A Court cannot, by granting a motion for summary judgment, decide fact matters, such as fraud, and its authority is circumscribed to determining if there are matters to be resolved during trial. Succession of Melendez v. DACO, 112 DPR 86 (1982).

Finally, it must be emphasized that the Special Commissioner only considered evidence on the charges alleged when the petitioner's case was referred to him by the Supreme Court of Puerto Rico. The Special Commissioner did not consider the facts which were unavailable due to the trial court's decision to rule upon the second mortgage foreclosure action by summary judgment. This caused petitioner to be denied his Fourteenth Amendment due process right to practice his profession. His property interest was taken from him without a meaningful hearing.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,



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APPENDIX

IN THE SUPREME COURT OF PUERTO RICO

In re:

Att. Jesùs M. Rivera Arvelo

Att. Carlos M. Ortiz Velàzquez

No. CP-88-617

Professional Conduct

PER CURIAM

San Juan, Puerto Rico, March 4, 1993.

On December 9, 1987 the Superior Court, Carolina Part, issued a partial summary judgment in behalf of the plaintiffs in an action dealing with nullity of judgment, nullity of juridical acta, mortgage foreclosure and damages, Civil case number 86-259, Succession of Pablo Grillo et al v. Pedro L. Santoni Romàn and Benigna Colòn de Santoni et al. As they were not in accordance, several of the defendants filed before us a review appeal in which they asked for the reversal of said judgment. Through a resolution dated June 16, 1988 we decided not accepted the appeal and we referred the file to the Attorney General so that he would investigate the professional conduct of Attorney Jesùs M. Rivera Arvelo and that of Notary Carols M. Ortiz Velàzquez in relation to

the facts that gave cause for this action. Having the report from the Attorney General, on October 5, 1988 we ordered the filing of the corresponding accusations.

I

According to our order, on October 27, 1988 the Attorney General filed the following accusations:

> FIRST ACCUSATION: Attorney Jesùs M. Rivers Arvelo acted in an illegal way against the professional ethic code when he accepted the property which guaranteed the mortgage not executed on December 15, 1975 by Pedro L. Santoni and Benigna Colòn do Santoni and the Conjugal Partnership composed by both, for the amount of $40,000, due upon presentation, with an annual rate of interest of 8½%, authenticated before the Notary Manuel Medina Aymat with the affidavit number of 1798.
>
> Attorney Jesùs M. Rivera Arvelo as a consequence violated what is ordered in Section 3773 of 31 LPRA, section 742 in relation to the res litigiosae as the transfer of the property to him and/or the conjugal partnership composed by him and his wife was done in a fraudulent way and against the public interest by the illegal way and manner in which the transfer was done and subsequent cancellation of the falsified promissory note in substitution of the original one; not falling this within any of the exceptions established by the said legal

dispositions. For said action, Notary Rivera Arvelo violated Rules 23 and 35 of Professional Ethic.

SECOND ACCUSATION: Attorney Jesùs M. Rivera Arvelo acted against the rules of Professional Conduct for the type of professional act that he performed in case number 86-259, filed before the Superior Court, Carolina Part, and his subsequent appeal for review before this Honorable Supreme Court.

The real and true knowledge that Attorney Jesùs M. Rivera Arvelo had on the transaction carried out as the promissory note object of the collection efforts filed in court on two occasions, the reach of his active participation in said judicial proceedings and in the transfer, acceptance and fraudulent cancellation of the property object of the lawsuits in which he represented the debtors -- even when acknowledging the right of the accused attorney to defend himself of the allegations filed against him -- clearly place him in a situation contrary to Rules 17, 26 and 35 of Professional Conduct as he knew that the original promissory note always was in the possession of the claiming party and he direct with ruses the facts to offer a false account of the facts and of the law on the matter related to the cases aired before the Court on case number 86-259 and then in his filing of the review appeal before this Honorable Court.

THIRD ACCUSATION: The lawyer and notary Carlos M. Ortiz Velàzquez, before whom deed number 25 was executed on October 5, 1982, violated the Public Notarial Affirmation and Rule 35 of Professional Conduct.

The lawyer-notary Carlos M. Ortiz Velàzquez did not act with the due prudence and zealousness needed in the exercise of the public function which permeates all the exercise of the notary, for he awarded a document and canceled another promissory note which simulated to be the original, and he affirmed of the proper efforts in this type of award, when in truth the canceled promissory note was false, and therefore, all the statements and proceedings related with said act are false and fraudulent.

His effort in the authorization of the award of deed number 25 before mentioned, as well as the cancellation of the promissory note object of these judicial proceedings, aided Attorney Jesùs Rivera Arvelo to accomplish acts which were illegal, against ethics and culpable which affected also third parties.

Both Attorney Rivera Arvelo as well as Notary Ortiz Velàzquez answered the complaint. With respect to the first accusation, Attorney Rivera Arvelo sustains that though deed number 25 was awarded before the judgment was notified, the right to the property ceded was not a property subject of litigation because at the time of awarding the deed the court had already issued, although not notified, the judgment. He also denies that he knew about the falsehood of the canceled

promissory note through deed 25 and that the same was canceled with the intention of fraud.

As to the Second Accusation, Attorney Rivera Arvelo alleges in his defense that the mortgage note canceled through deed number 25 was valid and that he can not be accused of having the knowledge that said promissory note had not been handed in to the grantor Mr. Pedro L. Santoni Romàn before the award of said deed.[1] Therefore, he maintains that he did not incur in improper conduct in his professional conduct within civil case number 86-259 before the Superior Court, Carolina Part.

On his part, with respect to the third accusation, the Notary Ortiz Velàzquez states in his defense that at no time did Attorney Rivera Arvelo informed him about the origin of the promissory notes to be canceled nor about any lawsuits in which said promissory notes could be involved.

II

Upon answer to the complaint, we appointed a Special Commissioner to preside over an evidentiary hearing and to render a report with the fact determinations that he understood to be pertinent. Hereupon we state the relevant facts as these appear from the history of the case and of the fact determinations made by the Special Commissioner and from the files of civil case number 77-416 before the

[1] In its memorandum in reply to the report from the Special Prosecutor Attorney Rivera Arvelo changed his position and now states that the promissory note was not valid and that it was canceled by an error and oversight of the Notary Ortiz Velàzquez.

86-259 before the Superior Court, Carolina Part, of which files we took judicial knowledge according to Rule 11 of the Rules of Evidence, 32 L.P.R.A. Ap. IV, R11.

A

On December 15, 1975 Mr. Pedro Santoni Romàn and Mrs. Benigna Colòn de Santoni subscribed before notary public Manuel Medina Aymat a mortgage note - affidavit number 1798 - for the principal amount of forty thousand dollars ($40,000.00) plus interests at the annual rate of eight and one half percent, payable to the bearer and due upon its presentation. To guarantee the compliance of this obligation Mr. Santoni Romàn and Mrs. Colòn de Santoni awarded a first mortgage over a rural property belonging to the Conjugal Partnership composed of both of them. This mortgage arises from deed number 73 of the same December 15, 1975 before Notary Medina Aymat. The text of said promissory note was totally transcribed in said deed.[2]

At the end of the 1975 or the beginning of 1976 Mr. Santoni Romàn negotiated the promissory note with Mr. Dominico Acevedo, who in turn negotiated it with Mr. Pablo Grillo Ramírez through the son of this last one, Mr. Rafael Grillo Leòn. Mr. Grillo Ramírez bought the promissory note with money belonging to the conjugal partnership composed by him and his wife, Mrs. Consuelo Leòn Torres. After the

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[2] For this time there was a personal relation of friendship between Mr. Santoni Romàn and Notary Medina Aymat, for since 1972 this notary had awarded all the documents related to Mr. Santoni Romàn's businesses.

purchase, the promissory note remained in the possession of Mr. Rafael A. Grillo Leòn.

Mr. Grillo Ramírez died in 1976. His only heirs were his wife, Mrs. Consuelo Leòn Torres, and their four sons, Rafael A., Pedro L., Hèctor L. and Víctor M. At the time of his death no one had presented the promissory note for its payment. This remained in the possession of Mr. Rafael A. Grillo Leòn, who then made several attempts without success to obtain the compliance with the obligation. On one occasion Mr. Grillo Leòn was summoned to the offices of Attorney Jesùs M. Rivera Arvelo, who was the lawyer for Mr. Santoni Romàn, to receive the payment there. Mr Grillo Leòn appeared with the promissory note, met Attorney Rivera Arvelo, but did not receive the payment for which he was summoned.

Therefore on April 20, 1977 the sons of Mr. Grillo Ramírez filed before the Superior Court, Caguas Part, an action for mortgage foreclosure and collection of money against Mr. Acevedo and Mr. Santoni Romàn and the Conjugal Partnership composed by any of them and unknown codefendants - civil case number 77-416. Although they mentioned as plaintiffs the Succession of Pablo Grillo Ramírez, they did not include as part of this succession the widow of Mr. Grillo Ramírez, Mrs. Leòn Torres.

In representation of codefendants Mr. Santoni Romàn and Mrs. Colòn de Santoni appeared Attorney Rivera Arvelo, who on December 12, 1977 signed an answer to the complaint and a counterclaim by the defendants. In the fourth paragraph of the counterclaim Attorney Rivera Arvelo asked that the Superior Court order the "devolution of the

promissory note which remains in the possession of the plaintiffs-counterclaimed, aside from any other judicial order which corresponds under the law". (Our emphasis)

After these initial proceedings, the case remained inactive until on June 28, 1979 the Superior Court ordered it be filed under Rule 11 for the Administration of the Courts of First Level, 4 L.P.R.A. Ap. II-A, R.11. In the presence of a motion for the lift the judgment opportunely presented, the Honorable Julio N. Berrios Jimènez ordered the reopening of the case. With the exception of a written appearance by codefendant Mr. Acevedo. the case once again became inactive. Therefore, on June 24, 1982 the Superior Court issued an order to the parties to show cause why the case shouldn't be filed under Rule 39.2(b) of Civil Procedure, 32 L.P.R.A. Ap. II, R. 39.2(b). In the presence of insufficient justifications by the parties, on July 21, 1982 the Honorable Judge Mr. Berrios Jimènez issued a judgment in which he ordered the filing of the case with prejudice.

Upon learning of this, Attorney Jorge Figueroa Ortiz, attorney for the plaintiffs, asked Attorney Rivera Arvelo to accompany him so that they would together ask that the case be reopened. Attorney Rivera Arvelo agreed to this. Immediately after this they both went before the Honorable Judge Berrios Martínez. This last one, after hearing the proposal for the reopening of the case, reaffirmed his decision of filing the case with prejudice. The Secretary's Office of the Superior Court did not notify this judgment until October 18, 1982.

At the beginning of October of that same year and before the notification of the judgment, Mr. Santoni Romàn

and Attorney Rivera Arvelo reached an agreement on the partial payment of owned attorney's fees.[3] According to this agreement, Mr. Santoni Romàn and Mrs. Colòn de Santoni and the Conjugal Partnership composed by them would cede as a dation for payment their rights over the rustic property encumbered with the first mortgage which guaranteed the obligation shown by the mortgage note object of this lawsuit.

Attorney Rivera Arvelo then went to see Notary Public Carlos M. Ortiz Velàzquez so that this last one would award the cession. They were known to each other as they both had offices in the same building. After Attorney Rivera Arvelo explained the transaction and presented the originals of two promissory notes to be canceled as well as their respective deeds of mortgage, the Notary Ortiz Velàzquez asked him to submit a deed project for his review. At no time Attorney Rivera Arvelo make any mention of the lawsuit before the Superior Court, Caguas Part. Notary Ortiz Velàzquez reviewed and accepted the project presented by Attorney Rivera Arvelo.

On October 5, 1982 Attorney Rivera Arvelo and his wife, Attorney Isabel Delgado, and Mr. Santoni Romàn and his wife, Mrs. Colòn de Santoni appeared before Notary Ortiz Velàzquez. All of them read and signed the Deed of Cession of Legal Right through Payment of Debt and

[3] Attorney Rivera Arvelo had represented Mr. Santoni Romàn in several lawsuits in relation to the collection of monies against him and in a criminal action which had a duration of more than one month. On October of 1982 Mr. Santoni Romàn owned to Attorney Rivera Arvelo approximately sixty thousand dollars ($60,000.00) in fees.

Cancellation which is on record as deed number 26 within the registry for 1982 of Notary Ortiz Velàzquez. This last one did not collect any fees for his services.

Once the awarding was finished, Attorney Rivera Arvelo took the documents to carry through it inscription. The deed was presented before the Property Registry the following day, October 6, 1982 -- this is twelve (12) days before the Superior Court, Caguas Part, notified the judgment of filing due to inactivity in favor of Mr. Santoni Romàn and his wife.

Immediately after that, on October 8, 1982, Attorney Rivera Arvelo went once again to see Notary Ortiz Velàzquez and showed him a petition for his authorization. Through this petition he intended to ask for the cancellation of a notice of lis pendens registered at the margin of the inscription of the rustic property on which fell the right of property object of the cession. Said notice corresponded to civil case number 77-416 before the Superior Court, Caguas Part. Although he authorized the petition that same day as was presented to him by Attorney Rivera Arvelo, Notary Ortiz Velàzquez did not become aware of the fact that the property subject of the notice was the same one over which fell the right of property ceded to Attorney Rivera Arvelo through deed number 25.

The petition was presented before the Property Registry that same day -- that is ten (10) days before the Superior Court, Caguas Part, notified the judgment of filing due to inactivity in civil case number 77-416. The Registrar of the Property inscribed deed number 25 and canceled the notice of lis pendens on October 21, 1982.

B

Through deed number 25 two mortgage notes were canceled. In the first clause of said deed the text of both promissory notes was transcribed and it was stated that the originals were joined to his registry of documents. According to this clause, one of the promissory notes was a mortgage note - affidavit number 1798 - for the principal amount of forty thousand dollars ($40,000.00) with an annual interest rate of eight and one half percent, payable to the bearer and due upon presentation, subscribed on December 15, 1975 before Notary Public Manuel J. Medina Aymat by Mr. Pedro L. Santoni and Mrs. Benigna Colòn de Santoni. From the transcription it can be seen, also, that the obligation was guaranteed with a mortgage constituted through deed number 73, signed by Mr. Santoni Romàn and Mrs. Colòn de Santoni, before Notary Medina Aymat on the same December 15, 1975.

The text of the promissory note joined to the registry as the original, nevertheless, did not exactly correspond to the text transcribed on the first clause. The supposed original specified an annual rate of interest of nine percent while the transcription specified one of eight and a half percent. The remaining text of the supposed original corresponded to the transcription. Neither Notary Ortiz Velàzquez when authorizing deed number 25 nor the Property Registrar when inscribing the same and canceling the mortgage over the property, noticed the discrepancy.

The next transcribed in the first clause corresponded to the mortgage note in possession of Mr. Rafael A. Grillo Leòn and subject of the lawsuit before the Superior Court,

Caguas Part. The canceled promissory note had the same number of affidavit, specified the same principal amount, stated that it was guaranteed with the same mortgage and appeared to have been signed by Notary Medina Aymat, Mr. Santoni Romàn and Mrs. Colòn de Santoni. Therefore, by virtue of the inscription of deed number 25 the mortgage that guaranteed the compliance with the obligation shown by the promissory note in possession of Mr. Rafael A. Grillo Leòn was canceled.

C

On January 30, 1986 the Succession of Pablo Grillo Ramírez, Mrs. Leòn Torres included, filed before the Superior Court, Carolina Part, an action for the nullity of juridical act, mortgage foreclosure and damages against Mr. Santoni, Mrs. Colòn de Santoni and the Conjugal Partnership composed by them, and against Attorney Rivera Arvelo, Attorney Isabel Delgado and the Conjugal Partnership composed by both of them. The plaintiff alleged that the promissory note canceled in deed number 25 was a simulation of the promissory note in his possession and asked, among other things, the cancellation carried out by virtue of said deed be canceled as well as its corresponding inscription with the Property Registry.

In his answer dated February 26, 1986, Attorney Rivera Arvelo appeared on his own behalf and denied all the allegation of the complaint, two of them for lack of knowledge and belief. Under this last basis he denied (1) that the conjugal partnership composed by Mr. Santoni Romàn and Mrs. Colòn de Santoni was the owner of the

"property mortgaged for the date of the awarding of the mortgage note" which allegedly was in the possession of the Succession of Pablo Grillo Ramírez, and (2) that said promissory note "was expressedly agreed that it would be due upon presentation".

Together with his answer, Attorney Rivera Arvelo filed a counterclaim in which he claimed damagers for the supposedly defamatory allegations made in the complaint. On the other hand, that same day he filed a complaint against a third-party defendant against the attorney for the plaintiffs, Attorney Rafael A. Díaz Díaz, in which he claimed damages for the "frivolous and defamatory" way in which said attorney allegedly had filed the complaint in representation of the Succession of Pablo Grillo Ramírez.

Following this, on April 26, 1986 the plaintiffs asked permission to amend the complaint so as to include as a cause of action the objection of the validity of the judgment issued by the Superior Court, Caguas Part, in the civil case number 77-416. Five days later, Attorney Rivera Arvelo asked that all his allegations be retroactively amended to clarify that he was appearing on behalf of all the defendants, except Mrs. Colòn as her whereabouts were unknown. For this date the marriage between Mr. Santoni Romàn and Mrs. Colòn had been dissolved through divorce.

After several incidents among which stands out the dispatch of two partial judgments in which both the counterclaim and the complaint against a third-party defendant were dismissed. On or about May 1987 the defendants, with the exception of Mrs. Colòn, presented a motion in which they asked that a summary judgment be

issued in their favor under the doctrine of res judicata. The plaintiffs opposed this expediently and, at the same time, presented their own motion for summary judgment duly accompanied by documents and sworn statements. Defendants did not appear in opposition to this motion.

Among the exhibits which accompanied their motion, plaintiffs included a copy of the promissory note in their possession and a copy of the promissory note canceled through deed number 25. They also included a sworn statement from Notary Medina Aymat, dated April 29, 1986, in which he stated:

> 8. That the promissory note canceled through deed number 25, awarded in San Juan, Puerto Rico, on October 5, 1982, before the Notary Carlos M. Ortiz Velàzquez, was not the promissory note described in deed number 73 about mortgage executed on December 15, 1975, before me.
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> 10. In the same way, the promissory note canceled through deed number 25 awarded on October 25, 1982, before Notary Carlos M. Ortiz Velàzquez, does not bear my signature, but that the one which appears there is a simulation of mine.

Notary Medina died some time after he signed said statement and before the proceeding before the Special Commissioner started.

Through a partial judgment dated December 9, 1978, the Superior Court, Carolina Part, denied the motion of the

defendants and accepted the motion of the plaintiffs. As a matter of fact, the court ruled that the promissory note canceled through deed number 25 was not the original note which had been awarded under the affidavit number of 1798 before Notary Medina Aymat on December 15, 1975. As a remedy it ruled, therefore, the nullity of the judgment issued on July 21, 1982 in civil case number 77-416 before the Superior Court, Caguas Part, and the nullity of deed number 25 and its corresponding inscription in the Property Registry.

Within the period of ten days of the notification of said judgment, the defendants, with the exception of Mrs. Colòn, asked for amendments to the facts determination. Although the court denied said request on February 29, 1988, the Secretary of the Superior Court, Carolina Part, did not notify said resolution until April 25, 1988.

Not in agreement with this, the defendants, on May 24, 1988, with the exception of Mrs. Colòn, filed before us a revision petition in which they asked for the reversal of the partial summary judgment issued on December 9, 1987. Through a resolution dated June 6, 1988 we denied their petition and refer the record of the case to the office of the Attorney General.

As to Mrs. Colòn, on April 7, 1988 the court issued a judgment in contempt of court against her in which it granted to the plaintiffs the same remedies that it had conceded in the partial summary judgment dated December 9, 1987. Mrs. Colòn did not ask for the revision of this judgment.

D

Both the General Attorney as well as the Notary Ortiz Velàzquez stated that they were in agreement with the account of the case and the fact determinations made by the Special Commissioner. Attorney Rivera Arvelo, on his part, objected the determination made with respect to the simulation of the signature of Notary Medina Aymat on the promissory note - affidavit number 1798 - canceled through deed number 25. He maintains, in synthesis, that the Special Commissioner was mistaken when he accepted the opinion of the forensic examiner of documents which the Attorney General presented. He asks, therefore, that the opinion of his expert witness be adopted and the signature of Notary Medina Aymat on said promissory note be accepted as genuine. It is Attorney Rivera Arvelo's contention that to do so would corroborate his version of the facts.

According to this version, on December 15, 1975 Mr. Santoni Romàn and the then Mrs. Colòn de Santoni subscribed before Notary Medina Aymat a mortgage not - affidavit number 1798 - which specified a rate of annual interest of nine percent (9%). The next day and after Notary Medina Aymat told them that the rate of interest was illegal, they proceeded to subscribed another identical promissory note but this one specified an annual interest rate of eight and a half percent (8½%). Attorney Rivera Arvelo maintains that by mistake the first promissory note was never destroyed and remained between the documents that afterwards Mr. Santoni Romàn allegedly handed in to Notary Ortiz Velàzquez so that this one could prepare deed number 25. Upon receipt of the promissory note with the nine percent annual interest rate, Notary Ortiz Velàzquez proceeded to

cancel it and neither Attorney Rivera Arvelo nor Mr. Santoni Romàn became aware that this promissory note was not the one that should have been canceled in said deed.

The Special Commissioner did not give credit to this version. Specifically he determined that it was Attorney Rivera Arvelo who handed in the promissory note to Notary Ortiz Velàzquez and who was in charge of the composition of the deed project. Therefore, the Special Commission concluded that Attorney Rivera Arvelo knew that the promissory note which was been canceled through deed number 25 was not the promissory note in the possession of Mr. Rafael A. Grillo Leòn and that the mortgage which was been canceled through said deed was the one guaranteeing this last promissory note.

In the absence of plain prejudice, bias or error on the part of the Special Commissioner upon considering the proof, we did not alter the fact determinations which as on this case were supported by the witnesses and documental proof. R. 41.5(b) of Civil Procedure, 32 L.P.R.A. Ap. III, R.41.5(b); In Re Colton, Villanueva, Mirò, Figueroa and Brunet, Opinion and Judgment of February 21, 1991, J.T.S. 24. Notary Ortiz Velàzquez clearly stated that it was Attorney Rivera Arvelo who gave him the promissory note and who was in charge of the composition of the deed project. Additional proof on his part was the fact that deed number 25 was the only deed of cancellation of promissory note in Notary Ortiz Velàzquez's registry of documents for 1982 in which the text of the promissory notes was included.

As to the expert witness proof, although we are in the same position as that of the Special Commissioner to

evaluate said proof, we agree with the criteria of the Special Commissioner that said evaluation was not necessary to resolve the case before us. The determining fact in this case is that at the moment of signing deed number 25 Attorney Rivera Arvelo knew that through that deed the mortgage which guaranteed the obligation shown by the promissory note that he knew was in the possession of Mr. Rafael A. Grillo Leòn was been canceled.

Let's heed, in the first place, the first accusation against Attorney Rivera Arvelo. This accusation, on its part, contains two imputations. On one hand, this accusation charges Attorney Rivera Arvelo with a violation to Rule 23 of Professional Conduct due to acquiring a property right in the property involved in the lawsuit that was recommended to him by Mr. Santoni Romàn. On the other hand, it charges him with a violation to Rule 35 for not stating the truth of the facts in the preparation and award of the deed through which he acquired from Mr. Santoni Romàn said property right. We now proceed to see each one of these accusations.

Rule 24 of Professional Conduct, in the relevant section, states that the "attorney should not acquire any interest or participation in the matter of the lawsuit which has been commended to him". Code of Professional Conduct, 4 L.P.R.A., Ap IX, C.24. It is one of the characters of this prohibition that a lawyer should not acquire any interest or participation in the properties or rights which are under litigation or that may be object of litigation between the party that the lawyer represents and the opposite party. See In re Castro Mesa, Vèlez Santiago, Colòn O'Neill and Arraiza, Opinion and Judgment of November 20, 1992, 92 J.T.S. 155;

In re Cepeda Parrilla, 108 D.P.R. 353 (1979). Therefore, if the properties or rights are under litigation, Rule 23 prohibits that a lawyer who represents one of the parties in the litigation acquires, directly or indirectly, any interest or participation in said properties or rights. This prohibition pursues to prevent those conflict of interests that could interfere with the exercise of an independent professional judgment on the part of the attorney to whom the client commended his representation.

In the present case, Attorney Rivera Arvelo acquired a proprietary interest in the property object of the action for the collection of monies and mortgage foreclosure after the Superior Court, Caguas Part, issued judgment but before the Secretary of said Court notified the same. It is clear, therefore, that at the time of acquisition, the litigation had not ended. On one hand, the judgment had not supplied any effect for in the records of the case a copy of its notification had not been filed. Rule 46 of Civil Procedure, 32 L.P.R.A. Ap. III, R.46; Pueblo v. Hernàndez Maldonado, Opinion and Judgment of December 6, 1991, 91 J.T.S. 93. On the other hand, in the absence of said filing, the terms for asking for reconsideration and to present a review appeal had not started to count. Rule 46 of Civil Procedure, 32 L.P.R.A. Ap. III, R. 46. It is enough to contemplate the supposed that any of the two post-judgment recourses would have been accepted to discredit the position of Attorney Rivera Arvelo that the property lost its litigious character when the Superior Court, Caguas Part, issued its judgment in favor of his clients. The conclusion is then compulsory, therefore, that Attorney Rivera Arvelo acquired his proprietary interest in the

property while it was still the object of a litigation in which he represented the defendants. This act constituted a clear and patent violation to Rule 24 of the Code of Professional Conduct.

V

As to the second imputation contained in the first accusation, Rule 35, in the relevant parts, expresses that "the conduct of any member of the legal profession ... in his relations with his partners (in the profession) must be sincere and honest" ... and that "the attorney should adjust to the sincerity of the facts ... when composing affidavits or other documents". Code of Professional Conduct, 4 L.P.R.A., Ap. IX, C. 35. Under this rule we have sanctioned disciplinarily those attorneys who, abusing the trust of their partners in the profession, have propitiated that the last ones have awarded documents which do not adjust to the sincerity of the facts. In re Laboy Rodríguez 113 D.P.R. 476 (1982).

In this case Attorney Rivera Arvelo went to his partner in the profession with offices in the same building, Notary Ortiz Velàzquez, so that this one would award the deed through which Mr. Santoni Romàn and his wife would cede to Attorney Rivera Arvelo and his wife the proprietary right over the litigious property and would cancel two promissory notes and the two corresponding mortgages. Notary Ortiz Velàzquez agreed to his petition and asked Attorney Rivera Arvelo to prepare the deed project.

Although Attorney Rivera Arvelo knew that the property and one of the mortgages to be canceled were object

of the civil case number 77-416, then pending before the Superior Court, Caguas Part, and that the guaranteed promissory note by said mortgage was in the possession of one of the plaintiffs in said lawsuit, Attorney Rivera Arvelo handed in a project in which he did not make any mention of any of these facts but in which he intended to cancel said promissory note and its corresponding mortgage. To obtain this he faithfully transcribed in the first clause of the project the text of the promissory note in the possession of Mr. Rafael A. Grillo Leòn and accompanied with the project a promissory note whose text was virtually identical to the text transcribed with the exception of the rate of interest specified. The promissory note accompanied was not the promissory note in the possession of Mr. Grillo Leòn.

Notary Ortiz Velàzquez accepted the project presented to him and this eventually became deed number 25 about "Cession of Real Right Through Payment of Debt and Cancellation", which was awarded on October 5, 1982. At no time during the initial interchange between him and Notary Ortiz Velàzquez, nor during the award of the deed, did Attorney Rivera Arvelo inform about the civil lawsuit then pending before the Superior Court, Caguas Part, or of the fact that the original promissory note was in the possession of Mr. Grillo Leòn. Therefore, upon awarding and inscribing deed number 25 the mortgage which guaranteed the compliance of the obligation shown by the promissory note in possession of Mr. Grillo Leòn was canceled, but said promissory note was not canceled but another almost identical one. For the purpose of the Property Registry, nevertheless, the canceled promissory note was the

promissory note in the possession of Mr. Grillo Leòn.

Though Notary Ortiz Velàzquez did not have any actual knowledge of the effect of the inscription of deed number 25 over the mortgage guarantee of the promissory note in the possession of Mr. Grillo Leòn, Attorney Rivera Arvelo did have knowledge of said effect. So much so that three days after the award of the deed, Attorney Rivera Arvelo came once again before Notary Ortiz Velàzquez so that he would cancel a notice of lis pendens referring to civil case number 77-416 then pending before the Superior Court, Caguas Part, to which the property was subjected to. Therefore, it is a forced conclusion that Attorney Rivera Arvelo propitiated that Notary Ortiz Velàzquez awarded a deed which did not adjust to the sincerity of the facts as these were known to Attorney Rivera Arvelo of personal and own knowledge. This action on the part of Attorney Rivera Arvelo constituted a very serious violation to the duty of sincerity and honest that Rule 35 of Professional Conduct recognizes as the duty of every attorney to his partners in the profession.

IV

We heed now to accusation number two against Attorney Rivera Arvelo. This accusation attributes to him violations to rules 17 26 and 35 of the Code of Professional Conduct for his professional conduct in the representation of the defendants in the civil case 86-259 before the Superior Court, Carolina Part, and in the presentation before us of an appeal for review of the partial judgment issued on said case on December 9, 1987.

Rule 17, in the relevant section, establishes that the appearance of a lawyer "before a court must be equivalent to an affirmation on his honor that in his opinion the case of his client is worth of a judicial sanction" and that "the signature of an attorney in an allegation in a case is equivalent to certifying that he has read the allegation and that according to his best information and belief it is well founded". Professional Conduct Code, 4 L.P.R.A. Ap. IX, C.17. Rule 25 on its part states that it is highly improper to initiate vicious lawsuits and to instigate false defenses. Professional Conduct Code, 4 L.P.R.A. Ap. IX, C.25. Lastly, Rule 35 imposes upon all and every attorney a duty of honesty and sincerity towards the courts and with the other partners of his profession.

After an evaluation of the records of civil case number 86-259 before the Superior Court, Carolina Part, and of the appeal for review filed before us, we conclude that the professional conduct of Attorney Rivera Arvelo was of such a nature that we can not avoid a disciplinary sanction. In particular, we point out that although the facts alleged were known to him from his own and personal knowledge, Attorney Rivera Arvelo denied all the allegations of the complaint. Later on, in his answer to the amended complaint, he accepted some of the allegations which he had denied previously. He also filed a counterclaim and a third-party complaint totally frivolous and lacking merits that was properly rejected by the Superior Court. Lastly, his conduct before said court was characterized by the repeated noncompliance of orders and by the lack of notification to the opposing party of several of the writs there presented.

Due to this conduct the opposing party was obliged to resort several times before the court to demand that Attorney Rivera Arvelo complied with the orders and notified on time the writs.

Even when acknowledging the right that Attorney Rivera Arvelo had of defending himself of the allegations made against him, it was also his obligation to exercise that right in a manner harmonious to the ideals and rules required in the Rule of Professional Conduct. By not doing so, we find that the professional conduct of Attorney Rivera Arvelo was at variance with Rules 17, 25 and 35.

VII

We go now, lastly, to the third accusation against the Notary Ortiz Velàzquez, who is accused with a violation of the notary public faith and Rule 35 of Professional Conduct for not having acted with the due prudence and caution upon awarding deed number 25 and in it be lacking the truth of the facts through the cancellation of a promissory note which was not the original.

We have repeatedly pointed out that the notary is a caution function which must be exercised with due diligence and professional zeal. In re Vergne Torres, Opinion and Judgment of April 30, 1990, 90 J.T.S. 67; In re Cruz Ramos, Opinion and Judgment of February 21, 1991, 91 J.T.S. 27. In the exercise of this function, the notary is obliged to strictly comply with the Notarial Law, the Rules of Professional Conduct and the contract between the parties. The non-observance of this obligation exposes the notary to

the corresponding disciplinary sanction. In re Rodríguez Bàez, Opinion and Judgment of January 31, 1992, 92 J.T.S. 15; In re Bringas Rechani, Opinion and Judgment of February 26, 1991, 91 J.T.S. 28.

As the custodian of the public faith, when a notary authorizes a document presumedly gives faith and "assures that said document complies with all the formalities of the law, formal and substantively, that the document is legal and truthful, and that the transaction is valid and legitimate". In re Feliciano Ruiz, 117 D.P.R. 269, 275 (1986). Faltering to the truthfulness of the facts is, therefore, one of the more severe errors that as the custodian of said faith a notary can commit. In re Landing and Aulet, 107 D.P.R. 500 (1976). Not only does he break the notarial public faith, but also undermines the integrity of the profession by not complying with the duty of honest and sincerity that is imposed upon every attorney by Rule 35 of Professional Conduct.

To incur in this error it is not necessary that the notary has intentionally be lacking the truth. In re Cacho Cacho, Opinion and Judgment of May 12, 1989, 89 J.T.S. 47. It can be the result of work lacking the zeal and the caution that demands the public function of the notary or from an excessive trust in the statements of a partner in the profession. In re Cacho Cacho, ante; In re Laboy Rodríguez, ante; In re Melèndez Pèrez, 104 D.P.R. 770 (1976).

In the present case the Notary Ortiz Velàzquez did not falter from the truth intentionally. There isn't any indication that he acted in bad faith or with the intention of deceiving. His lack was rather the fruit of neglect and of his trust in Attorney Rivera Arvelo. Although he asked Attorney

Rivera Arvelo to prepare a deed project, Notary Ortiz Velàzquez had ample opportunity to review the project. Even so, he did not notice that the rate of interest specified in the supposed original to be canceled did not correspond with the rate specified both in the project as well as in the mortgage deed. A careful examination of these three documents would have put on guard Notary Ortiz Velàzquez of the discrepancy.

On the other hand, Notary Ortiz Velàzquez rested on the manifestation made by Attorney Rivera Arvelo that he had verified the Property Registry and that there was no problem with the transaction. Nevertheless, he could have discovered the existence of the civil case number 77-416, then pending before the Superior Court, Caguas Part, when a few days after the awarding of deed number 25 he authorized for Attorney Rivera Arvelo the petition asking for the cancellation of the notice of lis pendens corresponding to said case. The notice referred precisely to the property over which the proprietary right ceded to Attorney Rivera Arvelo a few days before.

The exercise of the highest degree of prudence during the authorization of a petition or during the awarding of deed number 25 would have alerted Notary Ortiz Velàzquez of the severe irregularities that the transaction had. His neglect and the trust in his fellow attorney, nevertheless, took him to falter to the truth of the facts and avoided that he found the fault after having committed it. Considering the fact of this action over the scheme of documental authenticity and over the right and interests of the Succession of Pablo Grillo Ramírez, this forum can not allowed it go to unpunished.

The responsibility of the notary is personal, inadmissible and non-transferable. In re Gonzàles Gonzàles, 119 D.P.R. 496, 499, (1982); In re Laboy Rodríguez, ante.

VIII

When determining the disciplinary sanction that should be imposed to an attorney who has incurred in improper conduct, we are accustomed to consider, among other things, the previous history of the attorney; if this is the first deficiency or if it is an isolated conduct; and if the attorney has a good reputation in the community. In re Bermùdez Rivera, Opinion and Judgment of November 2, 1989, 89 J.T.S. 44; In re Calderòn Marrero, Opinion and Judgment of November 2, 1988, 88 J.T.S. 135.

In the case of Attorney Jesùs M. Rivera Arvelo, this is not the first time that a complaint on his professional conduct reaches us. In two previous occasions we warned him that in the future he should faithfully comply with the Code of Professional Conduct. As this case shows, Attorney Rivera Arvelo paid no attention to our warnings. Given the seriousness of his conduct upon obtaining proprietary interest on a property subject of litigation before the end of the litigation, of inducing a fellow notary to falter to the truth of the facts, and of having a professional conduct in quarrel with ethics, we decree the indefinite suspension of Attorney Jesùs M. Rivera Arvelo from the exercise of law practice and of notary practice.

In the case of Notary Carlos M. Ortiz Velàzquez, the Special Commissioner stated that the parties had stipulated

that during the years that he has exercised his profession as an attorney and a notary, his actions have always been within the rules demanded by the legal profession and that in the exercise of his profession has exhibited a conduct framed within the rules of honesty. We are aware, nevertheless, that on two previous occasions the office of the Director of Notary Inspection has referred to us reports on deficiencies in the notary documents of Notary Ortiz Velàzquez. On June 15; 1988, upon receiving the last of these reports and the complaint filed in this case, we ordered his temporary suspension from the exercise of the notary practice until we definitely solved said complaint. Notary Ortiz Velàzquez, therefore, has been suspended from the practice of notary for an approximate period of five years. We consider that said suspension was a sufficient disciplinary sanction for the errors found here.

The corresponding judgment will be issued.